In the United States Circuit Court of Appeals For the Ninth Circuit

No. 5050

In the Matter of the Petition of the ALASKA STEAMSHIP COMPANY, a corporation, owner of the Steamship "Victoria," an American vessel, for Limitation of Liability,

Petitioner and Appellee,

C. L. ANDERSON and Forty-two Others,

Claimants and Appellants.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. FRANK S. DIETRICH and HON. JEREMIAH NETERER, *Judges*

Reply Brief of Claimants and Appellants

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Reply Brief of Claimants and Appellants

The brief of appellee is misleading in many respects. The findings of the Commissioner are likewise misleading in many respects and on matters entirely apart from the issues in this case. The Commissioner makes the finding:

> "That each of the claimants had made the voyage north from Seattle to Nome in the steerage of the Victoria in the spring of the year

> 1924, and that there were a greater number of passengers in the steerage at that time than on the return trip in August, 1924. Further, that a number of the claimants had made trips to Alaska and return, in the steerage of the Victoria, for many years."

The Commissioner, after making a finding on the conditions aboard this vessel and the number of passengers carried in the spring of 1924 (which voyage had nothing whatever to do with this case), neglects, however, to find that on this particular voyage in the spring of 1924 that the white passengers were carried alone and were not berthed in with a lot of coolie Chinese cannery men in the steerage. He likewise fails to make a finding that the whole of the steerage was in the spring voyage devoted to passenger accommodations and that half of the largest part of the steerage was not devoted to and filled up with freight, as it was on this voyage.

The Commission also makes the finding:

> "The claimants made the voyage to Alaska for the purpose of prospecting as miners or as wage earners; a number of them being under contract to work for the Hammond Mining Company, located at Nome.
>
> "Due to a strike of employees of the Hammond Mining Company participated in by some of the claimants and other of the claimants affected by the closing down of operations of the company, returned to Seattle on the Victoria on the voyage in question."

Clearly, these findings are entirely outside of the question whether or not the passengers' contract was broken on the voyage in question, but are thrown in as a slur in accordance with the ideas of proctor for appellee—that prospectors, miners and wage earners were likewise strikers and for that reason not entitled to much consideration. These findings follow strictly the argument of proctor for appellee before the Commissioner and are practically copied therefrom. The evidence shows that but few of the claimants had been employed by the Hammond Mining Company, but were engaged on their own behalf in a venture of bettering their condition and developing the country.

ARGUMENT

The Commissioner made five findings, the first finding is,

> "The Victoria was staunch, properly manned, equipped and victualed for the voyage in question."

The second finding was:

> "The food of the first class passengers, officers, crew and steerage was of the same quality (with the exception that the coffee of the crew and steerage was of a lesser grade), and cooked at the same time and in the same vessels."

On these two findings the evidence is in direct conflict.

The third finding is:

> "Owing to the limited capacity of the dining room, it was not possible to seat all the steerage passengers at one time, and several seatings had to be made."

This finding is true.

The fourth finding of the Commissioner, which we wish to emphasize, was:

> "It was a matter for the passengers to decide who was served first or otherwise."

I.

THE FINDING THAT "IT WAS A MATTER FOR THE PASSENGERS TO DECIDE WHO WAS SERVED FIRST OR OTHERWISE" IS CLEARLY ERRONEOUS.

According to Mr. Crosby, the steerage steward's testimony on direct examination on behalf of the petitioner, the order and manner of seating the passengers was decided by the passengers who "had more force to push their way through and get to the table; fight their way to the table." This is the petitioner's own evidence and from its main witness and officer in charge of that department and is likewise corroborated by every other one of the witnesses and is not contradicted by any. We submit that there is but one conclusion that can be reached from this evidence by this court and that is, that the petitioner violated its

duty towards the passengers by not providing some orderly method of seating the passengers at the tables, and in guiding and controlling their conduct with reference to each other. It is the duty of the petitioner as much to see that one passenger is not harmed or trampled upon by another as to protect the passengers from any other source of injury, discomfort or annoyance. In this respect the petitioner clearly violated its duty and in so doing breached its contract with every one of the claimants.

The finding that it was a matter for the passengers to decide who was "served first or otherwise" on the vessel is perhaps about the most ridiculous proposition ever advanced by the owner of a steamship with the hope of having such a proposition accepted by any court and thereby relieve the steamship company from responsibility. Mr. H. S. Crosby, the steerage steward, testified at page 325 of the Commissioner's typewritten transcript of evidence as follows:

> (Mr. Bogle) "Q. Now, in serving the meals were there any confusion about the men getting to the table? A. Certainly. We had about 189 people aboard the ship and who ever got there first was first served. There was confusion there about that because when the tables were set the bell was rung and there was always a rush for the seats at the table. Q. I will ask you, Mr. Crosby, whether or not the Orientals were always

> served first? A. No. I could not say. Whoever got to the first table got the first meal. Q. Was or was not it the fact that the Orientals were always there at the first meal? A. No, there were a whole lot more whites ate at the first table than the Orientals, because they had more force to push their way through and get to the table, fight their way to the table."

It is respectfully submitted that on this finding of the Commissioner and evidence of the petitioner which stands uncontradicted that the appellants are each entitled to recover.

II.

THE CLAIM OF APPELLANTS THAT THEIR CONTRACTS WERE VIOLATED BY THE PETITIONER IN PERMITTING AND FURNISHING LIGHTS TO ENABLE GAMBLING TO BE CARRIED ON THROUGHOUT THE DAY AND NIGHT IS CONCLUSIVELY ESTABLISHED.

The petitioner likewise violated each of the contracts of the claimants in permitting and carrying on gambling and converting the steerage quarters into a gambling den and by furnishing and installing large candle power lights to aid in the conducting of the gambling and in furnishing the lights therefor throughout the night. The Commissioner failed to make any finding whatever as to the gambling and the converting of the entire dining quarters of the

steerage into a gambling den and using the same night and day throughout the voyage by professional gamblers, conducting a regular gambling house, and the only finding in the case by either the Commissioner or by the Hon. Frank S. Dietrick, Judge, in approving the findings, is that made by Judge Dietrick when he says in his memorandum opinion the following:

> "Doubtless, there was some gambling in the card games, but here, too, it is thought claimants have greatly exaggerated the effect upon their comfort."

The appellee's proctor in the lower court sought to make light of the effects of gambling conducted upon this vessel and voyage and to laugh the same away and that by so doing misled Judge Dietrick into the belief that the claimants "greatly exaggerated the effect upon their comfort," and to believe that card games were carried on for pleasure and that some gambling crept into the card games that were carried on, while the games actually conducted were all crooked gambling games of the most vicious type, black jack, stud poker, etc., all for large sums of money. Here again the evidence stands wholly uncontradicted.

1st. That the officers of the ship installed large candle power lights in the steerage eating quarters for the purpose of enabling the professional gamblers to conduct gambling throughout the night every night.

2nd. It is uncontradicted that the vessel, through its officers, furnished the electric lights throughout the night to enable the gambling to be conducted.

Had the master desired to stop the gambling all he would have had to do was to order the lights turned off in the gambling quarters. That would have stopped the gambling at night and the port holes could then have been left open, giving some ventilation in the steerage sleeping quarters. This they did not do, and there can only be one reason for failure so to do, and that is that the officers of the ship or the petitioner were participating in the profits from the gambling being conducted. The evidence shows and it is uncontradicted that this same Frank Ryan conducted gambling on the voyage 139 and voyage 140, which is the voyage in question, and on the next voyage, 141, also, traveling up and down on this ship as the head gambler on the vessel. The captain's own testimony is, "Well, I was told by a lawyer that nobody could stop it at sea, but at the same time I went up there every day and I would tell those fellows, 'Keep your money in your pockets, don't come to me a bellyaching about your damn money'." (Commissioner's copy of typewritten transcript, page 315.)

And at page 317 testified:

> "Q. Who is this Frank Ryan? A. He used to be steerage steward on there for years and years and he was the best man that ever they had and he was fired on account of the gambling. I suppose if I stayed up all night every night and would stand by there I could stop it."

It was not necessary for the captain to stay up all night. All he had to do was to order the electric lights turned off. It was his duty to have done so. That would have stopped the gambling. Certainly the ship could have refused to install extra large electric lights to be used for the gambling and could have refused to furnish the light throughout the night. That would have been a very simple way of stopping the gambling. There is no excuse for it, except that they participated in the profits. The captain further testifies:

> "Q. He (Frank Ryan) was a professional gambler? A. That is what he is. Q. And comes down in the fall on this boat? A. Yes. Q. Is it not a fact that he travels up and down on the two last trips in the fall? A. That is what they say."

The gamblers were further protected by the officers of the ship by permitting them to close up the port holes, the only source of ventilation into the after steerage sleeping quarters, so as to make it more comfortable for the gamblers to carry on their games in the dining quarters, which were directly above the

sleeping quaters. This rendered the conditions below indescribably bad and there isn't any question whatever about it, and that the claimants did not exaggerate in the least respect as to the conditions existing in their quarters at night. In fact it was impossible to fully describe them as bad as they were. Further, the company in permitting this gambling to be carried on by professional gamblers and the crew resulted in getting a crew consisting of gamblers, ex-convicts and prize fighters, and that is the class of help that they had on this voyage. Of course, they would swear to anything suggested by the petitioner to aid the company and that is the class of testimony sought to be weighed against the testimony of the claimants, all of whom were honest, hard working men who went into the north to prospect and better their conditions and to develop the country. We submit that this court must find on the admitted evidence of gambling that the contracts of each of the claimants were broken, and that the petitioner flagrantly violated its duty towards the passengers in looking after their care and comfort, by permitting the claimants' quarters to be used for the purpose of gambling as it was on this voyage.

It is respectfully submitted that no other finding can be made on the evidence. It is a serious matter

and damages should be allowed in favor of the claimants, not only to compensate them for the injuries and discomforts sustained, but to penalize the company for permitting such a course of conduct to be carried on in violation of law upon this vessel. The petitioner should not be permitted to allow a crime to be committed upon its vessels and gambling is made a crime in every state in the Union and in the Territory of Alaska as well. Nor should this court permit a crime of this kind to go unnoticed and to be laughed at as the proctor for appellee did in the lower court and by so doing misled the lower court into the error that there was only "some gambling in the card games."

III.

THE BERTHING OF A LOT OF CHINESE COOLIE CANNERY WORKERS IN THE SLEEPING QUARTERS WITH THE STEERAGE PASSENGERS AND INTERMINGLING THEM SHOULD OF ITSELF CONSTITUTE A BREACH OF THE WHITE PASSENGERS' CONTRACT.

It is the first time that the steerage white passengers were ever subjected to such humiliation. Heretofore only white passengers were carried in the steerage on this vessel and this was the first time that it

had happened. It is also clear that the claimants had no knowledge that such was to be the case, on this voyage. They were told by the agent at Nome that the sleeping quarters were large and airy and would not be crowded on the voyage going down. This is undisputed. Conditions which might be put up with by coolie Chinese laborers of the lowest type should not be the measure of the petitioner's duty toward the white passengers.

It is respectfully submitted that the mixing and pouring in of coolie Chinese cannery workers upon the white steerage passengers was a violation of the conditions of the contract of carriage which the company made with these claimants. It was a thing that had never been done before, as shown by the evidence, and the court should allow substantial damages against the petitioner for doing so, and not require white men to fight with a lot of Chinese coolie laborers to get a seat at a table to be served with sufficient food to keep them alive on the voyage.

IV.

THE STORAGE AND CARRYING OF FREIGHT IN THE QUARTERS SET ASIDE FOR THE STEERAGE PASSENGERS OF ITSELF CONSTITUTED A BREACH OF THEIR CONTRACT.

The small map, claimants' "Exhibit A-22," shows Hold No. 2, being the after steerage sleeping quarters, and that practically one-half of this, the larger part of the steerage quarters, was used for the purpose of carrying freight. The appellee in its brief says of this:

> "The fact is that 1200 cases of canned salmon was stowed against the after bulkhead to give the ship a proper trim (Ap. p. 1026)."

The fact is there was over 10,000 cases of salmon carried in the steerage sleeping quarters. Of this the captain says:

> (Mr. Bogle) "Q. Now do you know why the salmon was loaded in the after part of No. 2 between-decks? A. Because she was going by the head and I put that in aft between the bulkhead of No. 2 where it was not in anybody's way."
>
> (Page 315 Com. Typewritten Testimony.)

The excuse that the captain endeavors to give for carrying this large amount of salmon in the steerage quarters is that the vessel "was going by the head." The court will observe from the blue prints that where the salmon was placed in the after part of the steerage sleeping quarters it was still a considerable distance forward of amidship and the placing of any weight in the steerage quarters would put the vessel down by the head more than she was. John Paone, who had charge of the storing away of the

salmon in the steerage quarters, testified at pages 592 and 593 of the Commissioner's Typewriten copy of the Transcript as follows:

> "I would estimate that there were 9 to 10 thousand cases of salmon in that hold as we fininshed loading No. 2. I helped stow the cargo taken at Akutan and False Pass. It was stored in tiers, one on top of each other. The tiers were from five to seven cases high. That is as near as you can put it to the top and allow space for the pipes running back.
>
> "Q. 'And how as from side to side of the ship?'
>
> "A. From both ends, from both sides, as I remember, up to the hatch coaming; I do not say directly underneath the hatch. But I was one of the men that moved at least two sets of berths or standees, to make room near the hatch in order to get the salmon in. I asked the chief officer where he was going to put the rest and he said: 'Move the berths.'
>
> "I do not know how many were moved, but I know I at least moved two myself. I don't know how many men of the crew were helping. I should judge around eight or ten men. (593.) The salmon was carried from False Pass to Seattle. This Hold No. 2 between-decks was the same deck that the steerage was on, the same compartment where the steerage was berthed."

The witness further testified on pages 605 and 606 of the Commissioner's typewritten copy of transcript:

> "That the expression 'going by the head' as used by seafaring men means that the bow is

> down too far to have an even balance. The captain had testified that salmon was loaded in the aft part of No. 2 between-decks because the vessel was 'going by the head.'
>
> "The 'Victoria' is about 361 feet, I believe, and 41.1 width. (605.) 19 feet deep, gross tonnage 3,502, net 2,112. The aft part of hold No. 2 between-decks, which is set aside for steerage sleeping quarters, is forward of amidships, so that putting a load of salmon in the aft part of hold No. 2 between-decks would put her down more forward."

The reason given by Captain Davis for placing this large amount of salmon in the steerage quarters is self-evidently false, because the salmon was forward of amidships and would put the vessel down by the head more than she was before. It is simply another trumped-up excuse to avoid liability for another breach of the passengers' contract.

V.

CLAIM FOR PERSONAL INJURY AND DEATH OF JACK MILES.

The 9th finding of the Commissioner as to the injuries sustained by the claimant, Jack Miles, is as follows:

> "I find from the testimony that during the voyage the claimant Jack Miles was employed by the officers of the vessel to assist in stowing certain cargo taken on at way ports. That during the process of stowing certain barrels in one of

the after-holds, Miles with two other men similarly employed, rolled one of the barrels to its proper place, leaving it for another man to block in position; that he turned and walked toward the opening of the hatch to help care for other cargo coming in; that the barrel which he had just left rolled and struck his left heel, breaking the outer bone of the left foot. Miles also testified that the hold in which he was employed as stevedore, was not properly lighted; that this fact contributed to his injury. It also appears from the testimony that the person to whom Miles delivered the barrel which caused the injury, did not properly block the barrel in position which was a part of his duty."

The 3rd conclusion of law made by the Commissioner was:

> "As to the claim of Jack Miles for personal injury and the claim of the administratrix of the estate of Jack Miles, deceased, I recommend that said claims be dismissed for the reason that any injury suffered by said Jack Miles was due to the negligence of a fellow-servant."

This finding and conclusion seemed quite agreeable to the lower court and the appellee as being sufficient to deprive the claimant, Jack Miles, of any right of recovery for personal injuries. It was under the old decisions. But under Sec. 33 of the Merchant Marine Act, approved June 5th, 1920, it was not. But under this section and the decision of the United States Supreme Court in the case of the *International Stevedoring Company, petitioner vs. R. Haverty,* 71

L. Ed. 22, the findings of fact of the Commissioner, approved by the lower court, entitled the claimant to recover. It is true that the testimony as to the injuries of the claimant is not voluminous, but it is clear and stands wholly uncontradicted and is corroborated by the testimony of F. E. Baker, the first officer, and the only other evidence in the case. Mr. Miles testified:

> "They had 800 barrels of whale oil to load, that is what he said, and it was about 8 o'clock in the evening. We were working No. 4 hatch, finishing up, and they were shoving it down there to us so that we could hardly get it out of the way and they were hurrying. They didn't have any lights back in the place where we were putting them and there was one fellow letting them down in the hull with the machinery, and there is what they call the house that the shaft goes back through the shaft-house, and there were three of us there working together handling the barrels, rolling them back to this man. I should judge it was over 50 feet that we rolled them from the place where they came down. It was in the dark there. I could not see the place with the light they had. There were three of us would roll it back and then go back to get another one. While I was trying to get away from there, I was walking away from there and one of the barrels rolled back and caught my foot. Fireman Williams was in charge over us. He was employed by the ship and there were some sailors working with us." (Pages 18 and 19 of Commissioner's record.)

And on pages 32 and 33 testified:

> "I was hurt while they were working No. 4 hatch. I was working in the aft hatch in the lowest hold. I was rolling the barrels aft. They were not blocked up back there, I saw one blocked when it started to roll a little bit. I was not supposed to pay any attention to blocking. I was supposed to go back and start another barrel on its way. Two of the men went back and started to get the barrels away from the hatch. Then that man would look after them back there and then he would come and help us roll it back. (32,) We up-ended three or four at first, and then we rolled them over to the side of the ship, because they would not stay up on end; there was not room enough to set them up on end. We left them there for this fellow to look after them. I could not see in there as to how he was looking after them."

Mr. F. E. Baker, the first mate, testified at page 298 of the Commissioner's record:

> "That at Akutan Miles was working in the hold of the vessel where the lights were out; that they burned a fuse out."

As to his injuries, Mr. Miles testified that he complained about his injuries to those in charge of loading; that he was hurt and wanted to know if there was any way of getting off and they told him "No." He further testified as follows:

> "After I got out of the hold I went up to the purser's office and told him I was hurt. I asked for treatment and he says, 'The next fel-

low.' He did not answer me at all. I went down below then, and I suffered so that night, I complained to the fellows down there. I could not get out of there. I complained to the steward in the steerage department and he said there was no doctor aboard."

Miss Janette Warren, the stewardess and a graduate nurse, testified: "That Mr. Mile's foot was swollen pretty bad when she first saw it." (Page 418 Commissioner's record.) That they did not have a hospital room on the boat and that they did not carry a physician; that she was not on the Victoria in the year 1918 when 52 people died on that boat with the Flu.

The law requires a ship of this character to provide a hospital room for those that may be injured upon the vessel. (Sec. 8002, Comp. St.) Even the freight vessels with a crew of 12 or more, which does not even carry passengers, is required to carry medicine and have a hospital room where the injured or sick may be placed and treated. It is well settled in Admiralty that where a member of the crew is injured on a vessel and is not given the proper care and treatment that the company is liable for all of the resultant effects and permanency of the injury.

That the bones of Mr. Miles' foot did not unite, because the foot was not put in a cast and held rigid,

but by movements of the foot the bones grated and never did unite on that account.

It is next contended by appellees in their brief that Jack Miles signed a pay roll for the money which he earned at the time he was injured for his wages and that on this pay roll there was a provision printed to the effect that upon signing the same he released and discharged the company from all claims and demands and causes of action whatsoever from the beginning of the world up to date. Petitioner's "Exhibit 3." This is the first time that that contention was ever brought to the notice of a court. There was no release on discharge pleaded in the lower court nor ever mentioned in any of the arguments in any court until the same appeared in the brief of the appellee for the first time in this court—notwithstanding that the rules provide that the petitioner in a limitation of liability proceedings must set forth the facts in his petition by reason of which he claims an exemption from liability. This was not done in this case and no contract of release or discharge was ever made by the decedent, Jack Miles.

It is respectfully submitted that the widow of the decedent, Jack Miles, is entitled to recover damages for the injuries, pain and suffering which he received,

and also for the loss of earnings and for the causing of his death which is established from this evidence and was caused and resulted from the treatment he received on this boat. He was a well man and in good health when he went aboard the boat and his health was destroyed on this trip. He was a sick man when he came off the boat and never recovered and the testimony shows what caused his sickness and the destruction of his health, and damages should be awarded accordingly.

VI.

SECTIONS OF THE UNITED STATES COMPILED STATUTES 7997-98-99, 8000, 8001-2-3 OF THE TRANSPORTATION OF PASSENGERS AND MERCHANDISE ACT ARE APPLICABLE TO THIS CASE, AND WILL BE MADE SO BY ANALOGY AS BEING THE EXPRESSION OF CONGRESS ON THE REQUIREMENTS OF SHIPOWNERS IN THE TRANSPORTATION OF PASSENGERS.

Appellee has studiously avoided reference to any of the salutory provisions of the "Transportation of Passengers and Merchandise Act," being Chapter 6, Page 8514 of the U. S. Compiled Statutes, Annotated. Section 7997 provides for the accommodations of steerage passengers; Section 7999, for the berthing of steerage passengers; Sec. 8000 provides for light and air for passengers, ventilators, hatchways, companion-

ways, and water closets; Sec. 8001, food, tables and seats. Subdivision 5 of Section 8001, Compiled Statutes, provides:

> "(5) Tables and seats.
>
> Tables and seats shall be provided for the use of passengers at regular meals. And for every willful violation of any of the provisions of this section the master of the vessel shall be deemed guilty of a misdemeanor, and shall be fined not more than five hundred dollars, and be imprisoned for a term not exceeding six months."

Section 8002 provides for hospital compartments, surgeon, medicine; Sec. 8003, maintenance of discipline and cleanliness.

There is every reason in the world for holding this vessel to a strict compliance with these statutory provisions. They were the expressions of Congress made necessary from experience for the protection, care and comfort of passengers traveling at sea. This old vessel was built in 1870; the steerage sleeping compartment in which these passengers were carried was built into the vessel as a freight compartment, and has so remained ever since, and the fact, which the appellee makes much of, that the vessel has been run on this route in the same manner without changes made necessary by later statutes being made, is no excuse for its violation of the contracts of these claimants on this voyage.

These statutes even though the title of the Act does not make them by word applicable from Nome, Alaska, to Seattle, the court will by analogy make them applicable, as the voyages referred to in the statutes are practically the same length, and the conditions and requirements of the passengers are practically the same. This court in the case of *The J. D. Peters,* 78 Fed. 368, at Page 377, makes Section 4569 of the Revised Statutes, which applied to a voyage across the Pacific, applicable to a voyage from Port Townsend, Washington, to Port Clarence, Alaska, and says:

> "Section 4569 of the Revised Statutes applies to every sailing vessel bound on a voyage across the Pacific Ocean, etc. It is claimed by proctor for respondents that this law is inapplicable to the present case, because the vessel did not sail across the Pacific Ocean in making a voyage from Port Townsend to Port Clarence, Alaska. This is controverted by proctor for libelants, who claims that, to all intents and purposes, the bark J. D. Peters crossed the Pacific Ocean when she traveled from Port Townsend, Wash., to Port Clarence, Alaska, owing to the gradual and regular contraction of the parallels of longitude as these approach the North Pole. But, irrespective of whether the statute in question is applicable to the voyage in this case, I should apply, by analogy, the rule of 10 per cent., contained in the statute, as being a just and equitable rule to follow."

It is not even contended by appellee that it made any pretense at complying with any of the statutory

provisions, but makes much of the fact that the vessel has been run on this route for a number of years in the same manner it was on this voyage, but does not mention the fact that in 1918, fifty-two of the passengers lost their lives from Spanish influenza contracted in and from being confined in these same steerage quarters.

It is respectfully submitted that the petitioner by failing to comply with any of the statutory provisions clearly committed a breach of its contract with each of the claimants, and should be assessed with damages especially in a limitation of liability proceeding of this kind where the payment is to be paid out of the fund turned into court.

VII

IT IS NEXT CONTENDED BY APPELLEE THAT THE COMMISSIONER COMMITTED ERROR AND THE LOWER COURT COMMITTED ERROR LIKEWISE IN HOLDING THAT EACH SIDE STAND ITS OWN COSTS.

It is well settled that in limitation of liability proceedings the petitioner "must pay the preliminary expenses as such expenses are incurred by him for the purpose of availing himself of the benefit of the limitation statutes and are not taxable against claimants even though the latter are defeated."

In all cases the expenses of administration are paid out of the fund on the principle that the fund should administer itself. When the petitioner is successful and the fund is returned to him this constitutes payment of the costs by the successful party, but the reason is, of course, the same as in the case of preliminary expenses, i. e., that the payments were for the petitioner's benefit. Benedict's Admiralty 4th Edition, 383.

In the case of *Boston Marine Insurance Company vs. Metropolitan Redwood L. Co.*, 197 F. R. 703, at page 714, the court announces the rule as follows:

> "Nor do we find that the court erred in ordering that the cost of issuing and publishing the monition be paid out of the fund. All that the petitioner in such a case is required to pay is the expense incurred in availing himself of the act of Congress, the cost of filing the petition and stipulation for costs and value, and the expense of appraisal, etc. In the W. A. Sherman, 167 Fed. 986, 93 C.C.A. 228, the Circuit Court of Appeals for the Second Circuit said:
>
> " 'The cost of bringing in the creditors, such as filing, issuing, and publishing the monition, should be paid out of the fund, on the principle that it should administer itself, and this duty to administer itself applies even when, the petitioner being held not liable, there is no other distribution than to return it to him'."

Besides costs in Admiralty always lie in the discretion of the court. The lower court did not commit error in the taxing of the costs.

It is respectfully submitted:

1st. That the petitioner clearly violated the implied conditions of its contract of carriage of each of the claimants by turning their quarters into a gambling den and permitting gambling to be conducted night and day throughout the voyage, and should be held to strict account for such conduct. Even on land the owner of a premises in which gambling is permitted is liable in damages for the losses sustained by any person participating in the game, and here the claimants, while at sea, had no voice whatever in the matter. They were under the control, command and direction of the officers of the ship who had full power and authority to subject the passengers to punishment for disobedience to their commands.

2nd. That the petitioner broke its contract with the claimants by not maintaining discipline upon the boat and by not controlling the conduct of the Chinese fishermen towards the white passengers and in permitting the stronger passengers who had more force to seat themselves first at the table by "fighting their way to the table."

3rd. The court committed error in not finding that the contracts of each of the claimants was

broken by the petitioner by their intermingling and berthing a large number of coolie Chinese cannery men in with the white passengers.

4th. The lower court committed error in not finding that the contract of the claimants was broken by the petitioner by storing and carrying a large amount of freight in the steerage quarters, the quarters which were set aside for the steerage passengers and on which the certificate of inspection was issued.

5th. The lower court also committed error in not finding that the steerage sleeping quarters were kept and allowed to remain in a dirty, unclean condition and in not providing more than one person to look after the entire steerage sleeping quarters and that person simply a "work-away" under no obligation to do anything and who did not do anything toward keeping the quarters clean, and that the claimants were not given the treatment and accommodations that they were entitled to under their tickets.

6th. That the claimant, Mrs. Jack Miles, is entitled to recover damages for the injuries sustained by Jack Miles and for his death in addition to her right of recovery for breach of the contract of his ticket.

7th. That substantial damages should be allowed to each of the claimants in this case.

WM. MARTIN,
Proctor for Claimants and Appellants.